U.S. Department of Labor

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Issue date: 11Jul2001

Case No.: 2000-ERA-0027

In the Matter of

ARDIS W. SMALLS,
Complainant,

v.

SOUTH CAROLINA ELECTRIC & GAS,
Respondent.

Appearances:

Ardis Smalls
Pro Se

David R. Wylie, Esq.
For Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises from a complaint filed by Ardis Smalls ("Complainant") under the whistleblower provisions of the Energy Reorganization Act ("ERA"), 42 USC 5851. Complainant seeks compensation for alleged discriminatory treatment by Respondent, South Carolina Electric and Gas Co., for Complainant's alleged whistleblowing activities. Complainant received an unsatisfactory performance evaluation in 1999 and was terminated a year later. Complainant alleges that these events took place as a result of retaliation for his whistleblowing activities. Respondent defends on the grounds that its actions were only a result of Complainant's insubordination, egotistical behavior, inflammatory allegations against coworkers and his inability to function as a member of a team.

A hearing in this matter was held before me in Columbia, South Carolina on February 14-16, 2001, at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulation. Both parties submitted post-hearing briefs.[1] The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES PRESENTED

1. Did Complainant engage in protected activity?

2. Was adverse action taken against Complainant in whole or in part a result of retaliation for his whistleblowing activities?

3. If Respondent's actions against Complainant were only partly in retaliation for protected activity, would the actions have occurred without the retaliatory intent?

4. If the answer to questions one and two is, yes, what remedy should I recommend?

STIPULATIONS

1. Ardis Smalls was an employee of South Carolina Electric and Gas ("SCE&G") for all relevant times until December 20, 2000.

2. The parties are covered under the Energy Reorganization Act.

3. Except insofar as Complainant's discharge may be evidence of a continuing violation or insofar as Respondent's actions may be evidence of a pattern of unlawful conduct, Respondent's discharge of Complainant on December 20, 2000 is not an issue in this proceeding.

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[1] Respondent's motion to strike Complainant's post-hearing brief is denied. Although I received the brief subsequent to the assigned deadline, Complainant's *pro se* status, and my interest in considering all relevant arguments, persuade me to consider the brief. In addition, I find no prejudice to Employer from my considering this brief.

(Tr. 5-7).[2], [3]

BACKGROUND

Prior to his termination for insubordination, Complainant was a process control analyst at V.C. Summer Nuclear Station in Jenkinsville, South Carolina, which is owned and operated by Respondent. Since 1993, Complainant's job had been to monitor and evaluate the SIMPLEX fire protection system at V.C. Summer (Tr. 262).

Although his training was in computers, he has achieved considerable expertise in the SIMPLEX system (Tr. 278). Smalls has a bachelors degree in computer science from South Carolina State University and lacks nine hours of receiving sufficient credits for his masters degree in computer resources (Tr. 276). He has a history of filing grievances and complaints involving racial discrimination and safety concerns (CX 9). His supervisors acknowledge that he is competent and sincere (Tr. 91; RX 10).

Complainant has expressed concerns about the safety of the SIMPLEX system (Tr. 72-3; RX 2, RX 3). Management took these complaints seriously to the extent that the company actually stopped work on the system while the complaints were investigated (Tr. 149). Management chose an independent investigator named Bill Miller to perform an investigation of Mr. Smalls' complaints. He found nothing wrong with the system (Tr. 201, 267, 457; RX 17, tab 11). Subsequently, the NRC performed an investigation and mostly came to the same conclusion (RX 18; JX 1; Tr. 225-8).

During this time, Mr. Smalls wrote a number of memoranda, grievances, and complaints that, while detailing his concerns, also contained acrimonious accusations against coworkers, sometimes calling them "liars" (RX 2, 3). These were perceived as personal attacks on the integrity of coworkers (Tr. 29, 75, 331; RX 2, 3).

Complainant's concerns about the SIMPLEX system were not entirely without merit,

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[2] The following are references to the record:
CX - Complainant's exhibits
RX - Respondent's exhibits
JX - Joint exhibit
Tr. - Transcript of hearing

[3] At the hearing, I admitted all proffered evidence (CX 1-37 and RX 1-19) subject to a post-hearing motion to strike. Employer moved to strike CX 2 and CX 38. I granted the motion to strike CX 38, which was unopposed, but I denied the motion to strike CX 2. Thus, all but CX 38 are in evidence. In addition, following the hearing, Mr. Smalls submitted a copy of a letter to him from the Nuclear Regulatory Commission (NRC), which Employer has asked also be received into evidence. Without objection , it is admitted as JX 1.

and some changes were made as a result of them (Tr. 93). However, at the end of 1999, Mr. Smalls received his first unsatisfactory performance evaluation based largely on 1) the fact that management considered his complaints to be largely without merit; and 2) the fact that the way Mr. Smalls' complaints were expressed was offensive to many people (RX 1, 10). As a result of this sub-par evaluation, Complainant was denied a bonus for that year (Tr. 60).

Tensions between Mr. Smalls and company management increased. During a meeting on January 27, 2000, at which Jerry Stroud, Gary Taylor, and Mr. Smalls were present, Mr. Smalls walked out (Tr. 136-7). Later that year, management scheduled a meeting with Mr. Smalls to discuss his upcoming 2000 performance appraisal. The meeting was postponed three times when Smalls expressed a need for legal representation. At the fourth scheduled meeting, Complainant failed to appear at all (Tr. 142-4). At this point, Respondent discharged Complainant, allegedly for insubordination (CX 2 at 41).[4]

On February 2, 2000, Complainant filed the instant complaint with the Department of Labor. Following denial thereof, Complainant requested the hearing that is the subject of this recommended decision and order. In his prayer for relief, Complainant asks that the Department: 1) declare Respondent to be in violation of Complainant's rights under the ERA; 2) grant Complainant "full and complete relief from the effects of the acts of the Respondent;" 3) expunge from Complainant's personnel file any derogatory information relating to his employment with SCE&G; 4) provide neutral references and disseminate personnel information to inquirers only with permission of Complainant; 5) award compensatory damages in the amount of $250,000.00; 6) award Complainant punitive damages in the amount of $300,000.00; 7) award Complainant front pay; 8) award Complainant back pay; and 9) require Respondent to post a copy of my recommended decision and order in a prominent position on a public bulletin board at Respondent's V.C. Summer facility. Complainant expressly does not request to be reinstated at V.C. Summer.

The following is a summary of the testimony of record of witnesses at the hearing. All of the witnesses except Smalls are present employees of SCE&G at V.C. Summer.

A. TESTIMONY OF ROBERT BARTON

Mr. Barton prepared and signed an employee evaluation of Complainant for 1999 (CX 1). He stated that Mr. Smalls was "very dedicated and committed to the installation of a quality product..." (Tr. 29). Mr. Barton also testified that Smalls had alienated some coworkers because of his lack of respect for others. "His actions caused a significant delay in a major

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[4] By agreement of the parties, the discharge of Mr. Smalls on December 20, 2000 is not a separate issue in this proceeding (Tr. 7).

project and a large expenditure of resources to close out the issues" (Tr. 29). Smalls disagreed with the course of action that the Design Engineering group had taken (Tr. 30).

Barton testified that he received a memo from Smalls' supervisor, Mike Kammer, dated May 28, 1999 (Tr. 31). It stated that Kammer had reviewed Smalls' contention about design inadequacies, but nothing he had seen would cause him to question the operation of the system. Kammer believed that Smalls' claims went beyond concern and bordered on "defamation" (Tr. 33). Mr. Barton never met with Kammer regarding Smalls' memo (Tr. 35). Although Barton admitted that it would have been a good idea to discuss the memo with Smalls, he failed to do so (Tr. 37).

The 1998 evaluation of Ardis Smalls (RX 7) was overall a positive one, but Barton stated that "some training would be helpful in the area of negotiation, confrontation, so Ardis could better learn to better communicate with individuals who may not share his views/opinions" (Tr. 45). Barton and Mel Browne sat down with Complainant and discussed his performance evaluation with him. Smalls returned the following day with a response in letter form (Tr. 56). Smalls did not receive a bonus the following year due to his poor 1999 evaluation (Tr. 60).

Barton would not say whether or not Smalls slandered coworkers. He did not feel qualified to determine if the statements were slanderous (Tr. 64).

Barton, who was Smalls' direct supervisor, is a supervisor in plant support and engineering over the computer group (Tr. 65). Barton's supervisor was Mel Browne (Tr. 66). Smalls was assigned to the SIMPLEX fire system as a computer contact or representative (Tr. 67).

Smalls had issues with the SIMPLEX fire systems which he outlined in a letter to Mel Browne (Tr. 72). He disagreed with what he called "inadequate testing" (Tr. 74). Smalls accused employees of lying and falsifying documents (Tr. 75). Design Engineering's general conclusion was that any issues raised by Smalls had already been resolved or looked into (Tr. 77). Smalls' complaints led to some changes in procedures at V.C. Summer, and Barton cannot say that Smalls' concerns were totally groundless (Tr. 93).

Smalls received the first below-average performance evaluation that Barton had ever completed (Tr. 82). Smalls did not provide a standard peer input for his evaluation. Barton discussed Smalls' evaluation with Browne to ensure the fairness of the rating (Tr. 83). Although the 1998 evaluation had peer input, the evaluation for 1999 did not because Smalls' chose not to provide names (Tr. 85). Barton hoped that an unsatisfactory performance evaluation would help Smalls to make improvements in his interpersonal and communication skills, but it did not (Tr. 89). He continued to make unfounded accusatory and blunt statements regarding coworkers (Tr. 90).

Smalls was a competent employee who "felt he was doing the right thing" and sincerely believed that there were serious problems with the SIMPLEX fire protection system (Tr. 91). However, he received a below-average rating in 1999 after a meets-expectation rating in 1998 (Tr. 92). At least three evaluations out of the five completed by Barton stated that Smalls needed to improve his communications skills.

Currently, the SIMPLEX fire system is being operated by Bill Turkette and Hampton Grant, both skilled and competent workers (Tr. 98). Turkette has over twenty years of computer maintenance experience, and Grant received the same training that Smalls did (Tr. 99).

After receiving the "below expectations" rating, Smalls attempted to relinquish certain duties, but he did not have the authority to determine his own work assignment (Tr. 97-8). Barton testified that Smalls' below-average rating was in no way a retaliation for his raising of safety concerns at the plant or any complaints regarding the SIMPLEX fire system (Tr. 101).

B. TESTIMONY OF JERRY STROUD

Jerry Stroud works at the V.C. Summer Nuclear Station in Jenkinsville and has been a human resources ("HR") generalist with the company for 28 years. Stroud is "responsible for all HR programs, policies and procedures" (Tr. 107-8). Stroud first met Smalls in 1995, when Smalls filed a grievance against the company.

Stroud reviewed Smalls' performance evaluations and discussed the appropriateness of the ratings with management (Tr. 109). He also counseled Smalls about being tactful and not adversarial when communicating with coworkers (Tr. 110). Stroud did not remember being involved with or informed of any grievances in 1998 (Tr. 115).

In 1999, Kammer expressed concern to Stroud that Smalls had attacked Kammer's credibility as an engineer (Tr. 116). Stroud advised him to be patient and let management handle the "technical issues" before looking into other aspects of Smalls' allegations (Tr. 116-7). Stroud did not recall any specific meetings with Freddie Joy, Albert Lyons or Steven Byrnes about Smalls, but he may have discussed some of Smalls' written communications with these individuals (Tr. 122).

V.C. Summer requires multi-source input for evaluations. Input can come from any source requested by the supervisor (Tr. 126). All supervisors were trained on the multi-source input process for evaluations, but it is not a management directive (Tr. 127).

MD30 is a document that gives management an outline for handling serious employee issues and termination guidelines (Tr. 129). "It is not intended to ...manage an employee's performance. It's there mainly for disciplinary actions" (Tr. 129). No MD30 disciplinary action was taken against Smalls with regard to his 1999 performance rating (Tr. 130). Below average ratings are not a type of disciplinary action. However such a rating does make an employee ineligible for two compensation programs, bonuses and salary increases (Tr. 131).

On January 27, 2000, Smalls, Jimmy Duncan, Gary Taylor, Mel Browne and Bruce Williams met to discuss a letter that Kammer had written to management. The discussion appeared to upset Smalls, who then walked out of the meeting (Tr. 136-7). On four separate occasions, Al Barton tried to meet with Smalls to discuss his 2000 evaluation (Tr. 143). Smalls stopped the first three meetings, raising concerns about legal representation. Smalls did not attend the fourth meeting (Tr. 189). After the third failed

attempt, a letter was drafted clearly stating that, if Smalls did not attend his evaluation, it would be considered an extension of his continuing insubordination (Tr. 143).

Barton's fourth and final unsuccessful attempt to meet with Smalls occurred on December 19, 2000, when Smalls stated that he would not attend the conference (Tr. 143-4; CX 2, 39-40). Smalls apparently refused because he wanted legal representation to be present at the meeting, but Respondent's attorneys stated that it was not necessary for legal counsel to be present (Tr. 144)

Barton met with Stroud and informed him of Smalls' refusal to attend his evaluation conference. At Stroud's instruction, Barton sent Smalls home without pay to await a decision by management (Tr. 143). Barton, Rice, Greg Halnon (the general manager) and Stroud met and decided to terminate Smalls (Tr. 142-4).

On December 20, 2000, Smalls met with April Rice (manager of plant support engineering), Jim Roof, and Stroud. They informed Smalls that he was being terminated because of his insubordination (Tr. 138). The MD30 program was not followed because it applies to disciplinary actions where an employee is going to be told what the expectations and improvements are. MD30 does not apply to the decision to terminate an employee (TR. 149).

At the hearing, Stroud testified that Smalls was fired due to "insubordination and the employment relationship being unsatisfactory" (Tr. 138). The following exchange took place between Complainant, acting as his own counsel, and Stroud:

> Mr. Smalls: And you keep stating the [employment] relationship. What was the relationship that was told to you concerning Mr. Smalls that *led to the termination?* What was told to you from upper level management why the

> relationship was bad or tainted or what?
>
> Mr. Stroud: Well. . . we have documentation. . . going back to 1992 where your communication skills are inappropriate. During your employment, *you have filed three or four grievances. . . You have filed with the NRC. You have stopped the process on our SIMPLEX with what turned out to be mostly unsubstantiated allegations in the technical realm. When an Employer looks at all of this and you take the weight of all of that,* and [Complainant's attempt to resign from his job duties and refusal to attend required meetings], *when you weigh all of that into the decision process* – and an employer looks for mitigating circumstances. In this case, there weren't very many mitigating circumstances.

(Tr. 149-50, emphasis added).

Stroud believed that Smalls had become "a high maintenance employee" (Tr. 150). Stroud explained that management wanted employees to be "out there doing their job. . .and not tying up management and other employees out of the facility, keeping them away from the job they're out there to do *with all these ancillary issues that you raised*" (Tr. 150, emphasis added).

The MD30 criteria require termination for a level-one offense. If Respondent had invoked MD30, Smalls' insubordination and failure to meet satisfactory evaluation criteria would probably have been used to support term support termination of his employment (Tr. 161). Stroud steers management away from MD30 in disciplinary actions, preferring to encourage employees to improve (Tr. 161). The goal of V.C. Summer is to keep all concerns "below the line," which means that all concerns should be kept between the employee and his/her immediate or first-line supervisor (Tr. 162-3). "Above the line" concerns require written documentation of disciplinary actions. A performance evaluation is considered to be below the line (Tr. 163).

Employer's attorney asked Stroud whether Smalls' raising of claims with the Nuclear Regulatory Commission had any impact or any influence on the decision to discharge him. Stroud replied that it did not. The main reason for the discharge was his "insubordination in December," and the other reason was that "the employment relationship was unsatisfactory to the company" (Tr. 170).

C. TESTIMONY OF TIM FRANCHUK

Franchuk is employed at the V.C. Summer Nuclear Station. He has been with the company for 20 years and is the quality assurance supervisor (Tr. 190-1). He was the ECP (Employee Complaints Program) representative who investigated Smalls' concerns.

Franchuk first spoke to Smalls in May of 1999, regarding some e-mails written in which Smalls alleged that some tests were inadequate and fraudulent (Tr. 192). Management decided to place the concerns from the e-mails in the ECP (Tr. 194).

On July 6, 1999, Smalls gave Franchuk a letter accusing the company of discrimination and intimidation (Tr. 196). Management chose to place Smalls' concerns under ECP investigation, although Smalls himself did not request this action (Tr. 198). Mark King, the resident NRC inspector, advised that it was appropriate to place Smalls's concerns in ECP (Tr. 199). Management requested a third-party opinion by Bill Miller about Smalls' concerns with the SIMPLEX fire system (Tr. 201). Miller spent a week and concluded that none of the concerns rose to the level of a regulatory issue but suggested a couple of enhancements (Tr. 202).

The ECP is set up to consider quality and industrial safety concerns and allegations of employees (Tr. 219). The investigation of Smalls' complaints was thorough and lasted approximately six months (Tr. 220). The concerns were first given to the design engineering team to evaluate. Their response was documented in a June 24 memo, and Smalls was given an opportunity to respond. He did so on July 6 and raised concerns about discrimination (Tr. 221).

D. TESTIMONY OF JIMMY DUNCAN

Duncan works for Scana Corporation (SCE&G's parent corporation) as a manager of work force planning and employment in the Human Resources Department (Tr. 232). During the months of November and December, 1999, he was performing Stroud's job while the latter was on a leave of absence. Duncan handled two grievances by Smalls, one in 1997 and one in 1999-2000 (Tr. 233).

Duncan was aware that there had been problems between Smalls and other members of the SIMPLEX fire team (Tr. 236). He recalled a meeting with Smalls and Bruce Williams, then the general manager of engineering, in which Williams told Smalls that his complaints were invalid. Williams opined that Smalls' comments were inflammatory and had caused some coworkers to become upset because of harm to their reputations (Tr. 237).

E. TESTIMONY OF ARDIS SMALLS

Smalls was a process control analyst at V.C. Summer Nuclear Station until he was fired on December 20, 2000 (Tr. 262). His job included configuring the SIMPLEX fire-prevention system. The system is important because the NRC considers it a quality-related system. If the system were to fail, there is a backup manual fire protection system made of water sprinklers (Tr. 264). Bill Miller tested the system, but Smalls does not believe that he was qualified to do so (Tr. 267).

Thorough testing was not completed on the system as it should have been. Smalls believes that Kammer was aware of this failure to test but ignored and lied about it (Tr. 269-70). Kammer was in a rush to install the system in order to please management.

Smalls does not believe that he has a problem with tact. He is very blunt but does not mean to offend (Tr. 271). Freddie Joy was signing off on documents verifying that parts that had not even been installed were working correctly (Tr. 273). Smalls believes that the reason why no one agrees with his concerns about the system is because no one else has had the training or experience that he has with the system.

Complainant has a bachelor's degree from South Carolina State University in computer science (Tr. 276). He has formal SIMPLEX system training from the SIMPLEX Company in Gardner, Massachusetts.

Smalls stated that he is the only person who understands the SIMPLEX fire system as it relates to V.C. Summer (Tr. 278). It is a stand-alone system, but, if the system breaks down or needs to be reprogrammed, Smalls is the only one capable of handling the task (Tr. 279). The system was designed by Mike Kammer, a fire protection engineer, in 1993 (Tr. 281). Smalls is more qualified to handle the system than Kammer.

Tom Keckeisen agrees with Smalls about Joy and Lyons' checking off devices as functioning when they were not even there (Tr. 287). Smalls accused Joy and Lyons of not checking approximately 20 of the 1,043 devices or circuits in the system (Tr. 289).

Smalls is upset that he has been working since 1993 on the SIMPLEX system even though he did not ask to and never received the credit he deserved (Tr. 292-3). He denies ever being counseled about his interpersonal skills or lack thereof (Tr. 311). Smalls believed that validation and verification testing of the SIMPLEX system was required by the NRC (Tr. 311). Smalls testified that Responded "messed with my private life [and] messed with my livelihood for doing my job" (Tr. 315).

F. TESTIMONY OF MELVIN BROWNE

Browne is the manager of nuclear licensing and operating experience and has been with V.C. Summer for almost 20 years (Tr. 324). He has a degree in mechanical engineering and had a senior reactor operator license. Browne received letters from Smalls that he perceived as unprofessional (Tr. 330). He met with Franchuk and Moffatt regarding the letters, and they indicated that they were upset by Smalls' choice of words. Kammer and Lyons were particularly upset (Tr. 331).

Browne worked with Barton to complete Smalls' 1999 employee review. Both were present when it was discussed with Smalls (Tr. 336). The evaluation stated that Smalls had been a hindrance to the operation and that Smalls had essentially brought work to a halt (Tr. 337). After a meeting regarding the evaluation, Browne went to Smalls and stated that the conversation had been productive. He testified that Smalls' work up until that point had been adequate (Tr. 343). Smalls' job was to handle changes to software and perform maintenance on the system (Tr. 343). He received directions from Design Engineering through the modification packages (Id.).

Browne testified that he did not have any input into the selection of Miller to test the system. Browne was not aware that Miller had any SIMPLEX experience, but Miller did have a broad range of experience with manual and automatic systems (Tr. 346).

The SIMPLEX system was supposed to be a phased project. V.C. Summer is a large plant; so each phase encompassed a different area of the plant, as certain areas were inaccessible at different times (Tr. 353).

G. TESTIMONY OF MIKE KAMMER

Kammer is currently a design engineering supervisor at V.C. Summer (Tr. 358). In 1980, he graduated from the University of Maryland with a degree in fire protection engineering.

If the SIMPLEX system failed, there would be no risk to public safety unless there were an actual fire (Tr. 383). In case of a fire, there are a number of back-up systems at V.C. Summer (Tr. 383-4). A meltdown would not occur simply because the SIMPLEX system failed (Tr. 384).

In Kammer's opinion, Complainant has an understanding of how the fire protection and detection system works (Tr. 388). However, Kammer does not know that Smalls has a "full grasp of all the related issues" (Tr. 388). The computer analyst provides a supporting role on issues relating to "interfacing with the vendor software," and he basically follows design engineers' lead in defining the "tweaks" that need to be made to the system (Tr. 388-9). According to Kammer, Smalls' criticism of Kammer resulted from a misunderstanding of the company's fire safety systems and Kammer's role in them (Tr. 394-403).

Kammer remembered seeing allegations in letters from Smalls. He considered them to be baseless (Tr. 371). Kammer discussed Smalls' letters with his supervisor, Mr. Moffatt. Kammer responded in writing, expressing his concerns about the inflammatory remarks made by Smalls (Tr. 373).

Kammer concluded that Smalls had a notion of the way the system should work, but the system did not exactly work that way. Smalls was "out in left field a little bit" (Tr. 377). Kammer designed the system, tailored it to V.C. Summer, and modified it to match what the code requires (Tr. 377).

The first time Kammer met Smalls was a tense meeting with Smalls attacking Kammer as "the engineer that screwed up the system" (Tr. 402). Smalls is entitled to his own opinion, but Kammer did not appreciate the accusations about the SIMPLEX system not being a UL listed system. Kammer met with Smalls another time but does not remember when exactly. There was a room full of people, and some issues did not seem to make any sense to Kammer (Tr. 405). Kammer could not understand why Smalls would dislike him so much (Tr. 408).

H. TESTIMONY OF FREDDIE JOY

Joy is an instrument control maintenance supervisor who has been with V.C. Summer for 20 years. He has been involved with the SIMPLEX system since conception (Tr. 412). Joy believed that at times Smalls was not supportive of the project. Joy and Smalls had heated conversations and other communications problems regarding the system (Tr. 417). Lyons and Joy decided to write management a letter outlining the problems. Joy has some computer experience and extensive training in electronics. He does not have a degree (Tr. 432).

I. TESTIMONY OF ALBERT LYONS

For the past six years, Lyons has been lead engineer on the SIMPLEX system. He has been with SCE&G for 34 years (Tr. 439). Lyons is a registered electrical engineer and overall has had a good relationship with Smalls (Tr. 441). However, toward the end of the project, Smalls told Lyons that there were problems with the system and that Lyons could either support him or go down with everybody else when he contacted the NRC (Tr. 442).

On at least one occasion, Lyons investigated and determined that "Mr. Smalls was in a way right" (Tr. 468). This involved Smalls' complaint that there was a problem with the maintenance building bells (Tr. 442). Lyons admitted that "the bells really did end up being a problem" (Tr. 442). Smalls also complained about some inadequacies in the test sheets, which were later changed (Tr. 447-9).

Lyons testified that all but six devices in the SIMPLEX fire system have been thoroughly tested and will be retested in the future for the final close out (Tr. 443). One portion of the sig devices, the open circuit, was not tested (Tr. 445).

Lyons discussed the SIMPLEX fire system with Bill Miller, the consultant, who was not familiar with the system (Tr. 448). Smalls accused Lyons of making a mistake when a device malfunctioned. However, it was later revealed that Smalls had made the mistake by reversing numbers (Tr. 451-2). The correct data were on the test sheet, but they were improperly programmed into the computer (Tr. 452).

Lyons was selected for the SIMPLEX project because of his 27 years of experience as a fire fighter and 22 years as an instructor for the state in fire protection (Tr. 456). Installation of the SIMPLEX fire system is complete (Tr. 461). Test sheets are used to record which points function properly by using step-by-step instructions of what to check for (Tr. 462). The test sheets were developed over time as each piece of the system was installed.

Lyons and Joy wrote a letter to management requesting that Smalls' supervisor act as an intermediary to help avoid confrontation. They did not request that Smalls be removed from the team (Tr. 465-6). In Smalls' 1998 evaluation, Lyons wrote that too much time was being spent in confrontations with Smalls and trying to keep peace among team members (Tr. 467). They were on a timetable, and hours each day were spent on resolving the issues that Smalls raised (Tr. 467).

SELECTED EXHIBITS

J. PERFORMANCE MEASURE EVALUATION, 1999 (CX 1)

Complainant received the following scores, with selected comments:

- Values performance: Below expectations. Comments: Complainant "has failed on several occasions to consistently treat others with respect and care."
- Work quality: meets expectations. Comments: "An issue of team trust has developed due to the process Ardis used to raise issues with quality on the project."
- Internal/external customer satisfaction: meets expectations. Comments: "Some customers believe he has been a hindrance to the completion of 20951."
- Teamwork: below expectations. Comments: "I believe that Ardis truly felt it was more important to raise the issue to a higher level than whatever the personal consequences would be for raising the issue."
- Communication skills: below expectations. Comments: "When he knows his information will not be accepted, he should attempt to present it in a non-accusatory tone."

- Planning, organizing, and controlling: meets expectations.
- Overall performance level: Below expectations. Overall performance comments: "In his zeal to correct certain issues of quality with the product, he has alienated some team members and demonstrated a lack of respect for some individuals by the manner in which he raised the issue. His actions caused a significant delay in a major project and a large expenditure of resources to close out the issue."

K. MINOR DESIGN CHANGE FORMS (CX 3, CX 4)

These forms indicate that Complainant discovered and reported that certain bells involved in the fire protection system were not installed. The surveillance test was ordered to be redone to verify that the bells were ringing as per design (CX 3, p.1).

L. NRC INTEGRATED INSPECTION REPORT NO. 50-395/00-02 (RX 18)

This May 1, 2000 report describes the results of a five-week period of resident inspection. The investigation found one non-cited violation in the form of an inadequate surveillance procedure used to verify that the emergency core cooling discharge piping is full of water. Franchuk testified that the NRC conducted this investigation in response to Smalls' allegations (Tr. 225-8).

M. LETTER FROM NRC TO SMALLS AND ALLEGATION EVALUATION REPORT (JX 1)

The NRC generated this letter and report in response to a letter by Smalls dated January 7, 2001.[5] The NRC substantiated the allegation that there was a lack of testing of the SIMPLEX supervisory circuits. This testing was not required by NRC regulations, and there were no violations of NRC requirements. Complainant's other concerns - that Respondent falsified records by taking credit for improperly tested systems, violated programmatic procedures, and covered up lack of testing - were not substantiated. The report states that "it would be unreasonable to conclude" that any of the alleged coverups or falsification of records occurred.

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[5] At this point, the adverse action in this case had already occurred. However, the report addresses substantially the same allegations that Smalls made throughout his employment at V.C. Summer (Tr. 73, CX 12).

DISCUSSION

I. LEGAL STANDARD

In order to present a prima facie case under the ERA, a whistleblower complainant must show that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the complainant. Dartey v. Zack Company of Chicago, 82-ERA-2 (Sec'y, April 25, 1983) slip op. at 5. The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.

Where the complainant produces direct evidence of discrimination, and the employer does not effectively rebut this evidence, the employer can avoid liability only by showing by clear and convincing evidence that it would have taken the same action in the absence of protected activity. Blake v. Hatfield Elec. Co., 87-ERA-4 (Sec'y Jan. 22, 1992). Bartlik v. Tennessee Valley Authority, 88- ERA-15 (Sec'y June 24, 1992), slip op. at 4.[6] 6; Timmons v. Mattingly Testing Services, 95-ERA-40 (ARB June 21, 1996), slip op. at 7; 42 U.S.C. § 5851(b)(3)(D).

In a dual motive case, where the trier of fact determines that a combination of legitimate and prohibited reasons motivated the employer to take the adverse action, the employer bears the risk that the influence of legal and illegal motives cannot be separated. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1987);

Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 11159, 1164 (9th Cir. 1984); Mandreger v. Detroit Edison, 88-ERA-17 (Sec'y Mar. 30, 1994), at 11.

II. Complainant's prima facie case

A. Protected activity

An employee engages in protected activity under the ERA when he notifies his employer of an alleged violation of the act or participates in an enforcement proceeding or "in any other action to carry out the purposes of this chapter." 42 U.S.C. § 5851 (a)(1). Smalls engaged in protected activity when he repeatedly informed his employer and the NRC that, among other things, he believed the fire protection system had not been properly tested.

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[6] Analysis based on "pretext" is appropriate only in cases where the complainant seeks to rely on circumstantial evidence. Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996). Because the record contains direct evidence of discriminatory intent, I need only consider whether Employer would have taken adverse action in the absence of protected activity. Blake, Bartlik, supra.

Complainant's supervisors acknowledge that he is competent and sincere (Tr. 91; RX 10). Respondent emphasizes that many of Smalls' concerns were found to be invalid and that the SIMPLEX testing was not required by the NRC (RX 18). However, the implication is that some of Smalls' concerns were valid (See, e.g., Tr. 93, 97, 442, 447-9, 468). Regardless, the ERA may protect a complainant's safety-related activities even if the concerns are not substantiated. The determinative issue is whether Complainant reasonably believed that the reported conditions violated the underlying statute. See Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1994) Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992); Johnson v. Old Dominion Security, 86-CAA-3 (Sec'y May 29, 1991), slip op. at 15; Aurich v. Consolidated Edison Co., 86-CAA-2 (Sec'y Apr. 23, 1987), slip op. at 4.

I find that Smalls reasonably believed that his employer was committing at least some violations of the ERA.[7] The fact that he was right some of the time supports this finding. His concern is clearly related to the purposes of the act, ensuring nuclear safety, because a failure of the fire protection system could jeopardize the safety of the plant in the event of a fire (Tr. 383).[8] Respondent's management took Complainant's allegations seriously enough to bring in an NRC inspector, who found one uncited violation (Tr. 225-8; RX 18). Therefore, I find that Complainant engaged in protected activity.

B. Employer's knowledge of protected activity

There is no dispute that Employer was aware of Complainant's whistleblowing activities (Tr. 149-50, 224-5).

C. Adverse action

During his hearing, Smalls agreed that his discharge from the company was not the subject of the case, except insofar as it might be evidence of a continuing violation (Tr. 7). Therefore, the only adverse action at issue is Complainant's below-expectations performance evaluation in 1999. If an employer lowers an employee's performance rating due to adverse action, this may constitute adverse action. Boytin v. Pennsylvania Power & Light Co., 94-ERA-

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7 The NRC's statement that "it would be unreasonable to conclude" that certain violations occurred (JX 1) is based on a complete investigation and does not compel the conclusion that the allegations were unreasonable based on the information available to Smalls.

8 Kammer's testimony that there would be no safety consequences to SIMPLEX failure "unless there was a fire" (Tr. 383) implies, as common sense would indicate, that a fire would create a risk. Although a meltdown would not occur simply because the SIMPLEX system failed (Tr. 384), it is reasonable to conclude that a faulty fire protection system increases the risk of a serious fire and that a serious fire could jeopardize the safety of the nuclear reactor. The integrity of the fire protection system is directly related to the risk of fire, and, therefore, this is not a case in which Complainant is relying on speculative eventualities. Cf. Crosby v. Hughes Aircraft Co., 85-TSC-2 (Sec'y Aug. 1, 1993).

32 (Sec'y Oct. 20, 1995). Due to Complainant's 1999 rating, he was not eligible for bonuses or salary increases in the following year (Tr. 60, 131).

D. Evidence linking protected activity to adverse action

The text of the negative evaluation provides direct evidence that the evaluation was partly based on Complainant's protected activity. Part of the explanation for the below expectations 1999 rating indicates that Smalls' "actions caused a significant delay in a major project and a large expenditure of resources to close out the issue" (CX 1, p.3). This "delay" was apparently occasioned by the necessity for an outside inspection and NRC investigation into Smalls' allegations (Tr. 225-8). Barton testified that the 1999 performance rating was not given in retaliation for Complainant's whistleblowing activities (Tr. 101). However, the evaluation itself discredits Barton's testimony. By its own terms, the evaluation ties Complainant's low performance rating to his whistleblowing activity (CX 1, p.3).

In his explanation of Employer's reasons for the rating, Jerry Stroud provided further direct evidence that protected activity was a motivating factor in the rating. Stroud emphasized the "unsatisfactory" employment relationship between Employer and Complainant, stating that the relationship had broken down in part because Complainant "filed with the NRC" and "stopped the process on our SIMPLEX with what turned out to be mostly unsubstantiated allegations in the technical realm" (Tr. 149-50). Stroud also stated that the relationship suffered because management felt that other employers were distracted by the "ancillary issues that [Smalls] raised" (Tr. 150). On questioning by Employer's counsel, Stroud later attempted to recant by testifying that Complainant's reports to NRC did not effect his discharge (Tr. 170). I find his earlier testimony, which was more specific and made without the prompting of Employer's attorney, to be more persuasive.

III. Dual motive

Although the record contains direct evidence that a discriminatory motive contributed to the adverse action, there is also evidence that Complainant was rude, abrasive, and insubordinate in his interactions with co-workers. Barton testified that he hoped that an unsatisfactory performance evaluation would help Smalls to make improvements in his interpersonal and communication skills (Tr. 89), which is a legitimate reason to rate an employee's communication and teamwork skills as falling below expectations (EX 1).

Therefore, the dual motive test applies: Respondent must show by clear and convincing evidence that it would have given the same rating in the absence of the protected activity. The respondent bears the risk that the legitimate and prohibited motives cannot be separated.

In weighing the evidence, I find that the dual motives for Complainant's 1999 performance rating cannot be separated. Respondent cites several cases for the proposition that the manner in which an alleged whistleblower raises his complaints may be so inappropriate as to preclude him from protection under the ERA (Respondent's brief, p.36).

I have reviewed these cases, and I conclude that Complainant's behavior was less egregious than the behavior at issue in the cited cases. In American Nuclear Resources v. U.S. Department of Labor, 134 F.3d 1292 (6th Cir.1998), the complainant screamed and yelled at supervisors and refused to cooperate in required testing, causing a routine process to take several hours. In Lockert v. DOL, 867 F.2d 513 (9th Cir. 1998), the court determined that the complainant was discharged for leaving work area and not because of his protected activity. In Dunham v. Brock, 794 F.2d 1037 (5th Cir 1986), the complainant swore at his boss, dared management to fire him, and wrote an obscene expletive when asked to sign a form.

When a complainant uses intemperate language or engages in impulsive behavior associated with the exercise of whistleblower rights, there should be a balancing between the right of the employer to maintain shop discipline and the "heavily protected" rights of employees. Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y July 26, 1995) (finding that Complainant's behavior may have caused some workplace disruption but was not indefensible under the circumstances). To fall outside statutory protection, an employee's conduct actually must be indefensible under the circumstances. Id. While employees are protected when presenting safety-related complaints, they do not have carte blanche to choose the time, place and/or method of making those complaints. Id. An otherwise protected employee is not automatically absolved from abusing his or her status and overstepping the defensible bounds of conduct, even when provoked. Id.

In contrast, the evidence in the instant case does not indicate that Complainant used obscene language, trespassed, made threats, or exhibited other erratic behavior. Smalls' manner was abrasive and confrontational, and he frequently accused other employees of lying. However, the accusations of lying are intrinsically connected to Complainant's whistle-blowing activity. Taking the circumstances into account, I cannot find that his behavior was "indefensible". His concerns, partly substantiated, that thorough testing of the SIMPLEX system was not completed, were closely related to his belief that other individuals were lying and conducting a coverup. I find that the permissible and non-permissible motives for Complainant's discharge cannot be separated. Employer has not shown by clear and convincing evidence that it would have given Complainant a less-than-satisfactory performance rating in the absence of his protected activity.

IV. Remedy

Complainant requests several items of relief, only some of which are appropriate in the circumstances. He requests that I: 1) declare Respondent to be in violation of Complainant's rights under the ERA; 2) grant Complainant "full and complete relief from the effects of the acts of the Respondent;" 3) expunge from Complainant's personnel file any derogatory information relating to his employment with SCE&G; 4) provide neutral references and disseminate personnel information to inquirers only with permission of Complainant; 5) award compensatory damages in the amount of $250,000.00; 6) award Complainant punitive damages in the amount of $300,000.00; 7) award Complainant front pay; 8) award Complainant back pay; and 9) require Respondent to post a copy of my order in a prominent position on a public bulletin board at Respondent's V.C. Summer facility. Complainant expressly does not request to be reinstated at V.C. Summer.

The Department of Labor has the power to declare Respondent to be in violation of Complainant's rights and to order Respondent to post a copy of the order at the V.C. Summer facility, Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996)(ordering an employer to post a copy of the decision and order on all bulletin boards in the facility for sixty days and to ensure that the copies were not removed or covered). I will recommend that it do so In the interest of granting Complainant full and complete relief from Respondent's actions, I will also recommend that Respondent pay Complainant a bonus in the amount he would have received if Respondent had given him a rating of "meets expectations" in 1999.[9] The Administrative Review Board has determined that an administrative law judge may award the complainant a bonus in the amount that he would have received if not for the adverse action, plus interest. Hobby v. Georgia Power Company, 90-ERA-30 (ARB Feb. 9, 2001).

In addition, I will recommend that the Department of Labor order Respondent to expunge all references in Complainant's file to the 1999 performance evaluation, as well as to any intemperate conduct that is related to protected activity. McMahan v. California Water Quality Control Board, San Diego Region, 90-WPC-1 (Sec'y July 16, 1993). The Department may not order Respondent to issue a "neutral" reference but only a reference that omits all negative references to the protected activity that is the subject of the case. Smith v. Littenberg, 92-ERA-52 (Sec'y Sept. 6, 1995). For practical purposes, however, Complainant's accusations and intemperate conduct cannot be separated from his whistleblowing activities. Therefore, I will recommend that Employer, upon request, provide references for Complainant that contain no mention of his intemperate conduct, 1999 performance evaluation, or whistleblowing.

However, I will recommend that Complainant not receive punitive damages. Punitive damages are not allowable absent express statutory authorization, and the ERA whistleblower provision does not provide for such damages. Smith v. Esicorp, Inc., 93-ERA-16 (Sec'y Mar. 13, 1996). Furthermore, because Complainant has excluded his discharge from consideration, neither front pay nor back pay is appropriate. These remedies compensate a complainant for lost earnings due to improper discharge, and they are not appropriate remedies for a subpar performance rating. Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991), slip op. at 11 (stating that the purpose of a back pay award is to restore the employee to the same position that he would have been in if not discriminated against); West v. Systems Applications International, 94-CAA-15 (Sec'y Apr. 19, 1995) (stating that front pay is an alternative to reinstatement as a remedy for wrongful discharge).

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[9] If this cannot be determined, I will recommend that the Department of Labor order Employer to pay Complainant the amount that he received as a bonus in the previous year. Testimony also indicated that Complainant's "below expectations" rating made him ineligible for a salary increase (Tr. 131). However, the record contains no evidence regarding Employer's pay scale or the amount of increase that would have been available. I find that it would be too speculative to recommend an award based on a potential salary increase.

Finally, Complainant has not made the necessary showing to receive compensatory damages. In order to recover compensatory damages, a complainant needs to show that he experienced pain and suffering and that the unlawful activity caused the pain and suffering. Blackburn v. Martin, 982 F.2d 125,131 (4th. Cir. 1992); Crow v. Noble Roman's, Inc, 95-CAA-8 (Sec'y Feb. 26, 1996). Although expert testimony is not necessary, Busche v. Burkee, 649 F.2d 509, 519 n.12 (7th. Cir 1981), the complainant must present some evidence to support a claim of emotional distress or physical injury. Smalls has not even alleged that he suffered emotional or physical consequences based on the performance rating; much less has he provided evidence to support such a claim.

RECOMMENDED ORDER

It is hereby recommended that the Department order the following:

1. Employer shall pay Complainant damages equal to the amount of the bonus that he would have received had he received a "meets expectations" rating on his 1999 performance appraisal or, if such amount cannot be determined, equal to the bonus he received in the previous calendar year.

2. Employer shall pay interest, compounded quarterly, at the applicable federal rate specified in 26 U.S.C. §§ 6621, computed from the date on which the bonus would have been paid. See Doyle v. Hydro Nuclear Servs., Inc., 89-ERA-22 (ARB Sept. 6, 1996).

3. Employer shall post copies of my recommended decision and order and of the final decision and order in this case in prominent places on the premises of V.C. Summer Nuclear Power Plant for sixty days and shall ensure that such copies are not removed or covered.

4. Employer shall expunge all references to Complainant's 1999 performance evaluation from Ardis Smalls' personnel file. Upon request, Employer shall provide references that contain no mention of Complainant's negative performance evaluation and whistleblowing activities.

5. All of Complainant's other requests for remedies are DENIED.

A

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cmp
Newport News, Virginia

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.